

Message Text

PAGE 01 PORT A 01006 01 OF 02 221825 Z

41

ACTION ARA-17

INFO OCT-01 ADP-00 SS-15 NSC-10 AID-20 CIAE-00 DODE-00

INR-10 NSAE-00 PA-03 RSC-01 USIA-12 PRS-01 EB-11

COME-00 SCI-06 IGA-02 HEW-08 OPIC-12 TRSE-00 L-03

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P 221730 Z JUN 73

FM AMEMBASSY PORT AU PRINCE
TO SECSTATE WASHDC PRIORITY 6001

UNCLAS SECTION 1 OF 2 PORT AU PRINCE 1006

E. O. 11652: N/ A

TAGS: EIND, HA

SUBJ: HEMO CARIBBEAN

THERE FOLLOWS UNOFFICIAL TRANSLATION OF FRENCH LANGUAGE
LEGAL DOCUMENT DATED JUNE 15 AND FURNISHED EMBASSY JUNE 21
UNDER LETTER OF TRANSMITTAL FROM SECRETARY OF STATE FOR
COMMERCE AND INDUSTRY FOURCAND DATED JUNE 18, 1973:

HAS "HEMO CARIBBEAN" COMMITTED VIOLATIONS OF ITS
CONTRACT OF SEPTEMBER 4, 1970 WHICH CAN BRING ABOUT ITS
CANCELLATION?

THE LAWYERS OF MR. JOSEPH B. GORINSTEIN ON THE BASIS
OF RIGHTS PREVIOUSLY GRANTED TO HIM AND EXERCISED BY
"HEMO CARIBBEAN" HAVE RAISED STRONG PROTESTS AGAINST THE
FOLLOWING MEASURES TAKEN BY GOH:

- 1) CLOSING PLASMAPHERESIS CENTERS
- 2) WITHDRAWAL OF HEMO CARIBBEAN'S AUTHORITY TO OPERATE.

IT IS IMPORTANT TO SUBJECT THE CLAIMS OF MR. J. B.
GORINSTEIN TO A COLD AND IMPARTIAL LEGAL ANALYSIS BASED ON
THE STUDY OF THE CONTRACT OF SEPTEMBER 4, 1970 BETWEEN
THE HAITIAN STATE AND THE SAID GENTLEMAN.

A) REASONS FOR FORECLOSURE CLEARLY SET FORTH IN THE
TEXT OF THE CONTRACT:
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PAGE 02 PORT A 01006 01 OF 02 221825 Z

1) ARTICLE 12 (PARAGRAPH 3) OF THE CONTRACT STATES:
FAILURE TO MEET REQUIREMENTS OF THE TERMS OF THE PRESENT
CONTRACT, AFFECTING OBSERVANCE OF STANDARDS LAID DOWN BY
THE DEPARTMENT OF PUBLIC HEALTH RESULTS IN THE BREAKING OF

THE CONTRACT.

2) ARTICLE 14 OF THE TEXT UNDER STUDY STIPULATES THAT:
"FAILURE TO CARRY OUT THE OBLIGATION PLACED ON THE BENEFICIARY
OF ARTICLES 1 AND 9 WILL LEAD TO FORECLOSURE OF THE PRESENT
CONTRACT."

STUDY OF THE TERMS OF ARTICLES 1 AND 9, 12 AND 14
PERMITS THE CLARIFICATION OF THE FOLLOWING ELEMENTS:

A) THE HOLDER OF THE CONCESSION IS SUBJECT TO THE
ADMINISTRATIVE AND TECHNICAL SUPERVISION OF THE DEPARTMENT OF
PUBLIC HEALTH AND POPULATION.

B) THE HOLDER OF THE CONCESSION IS OBLIGED TO TAKE
CERTAIN ACTIONS JOINTLY WITH THE DEPARTMENT OF PUBLIC HEALTH
AND POPULATION.

AA) THE ADMINISTRATIVE SUPERVISION FORESEEN IN THE
CONTRACT IS PARTICULARLY EVIDENT IF ONE CONSIDERS ARTICLE 8
WHICH STATES: " BENEFICIARY IS OBLIGED TO SUBMIT PLANS FOR
CONSTRUCTION AND FURNISHING OF ANY PLASMAPHERESIS CENTER TO
THE DEPARTMENT OF PUBLIC HEALTH AND POPULATION. CONSEQUENTLY,
THE OPENING OF THE CENTER WILL BE SUBJECT TO WRITTEN AUTHORI-
ZATION OF THE SAID DEPARTMENT."

NOW, THE HOLDER OF THE CONCESSION OPENED A PLASMAPHERESIS
CENTER (THE 2 ND) IN PORT- AU- PRINCE, BOULEVARD JEAN- JACQUES
DESSALINES WITHOUT THE AUTHORIZATION PROVIDED IN ARTICLE 8.

THIS IS A FLAGRANT VIOLATION OF A SUBSTANTIAL PROVISION
OF THE CONTRACT OF SEPTEMBER 4, 1970.

FURTHERMORE, ARTICLE 10 OF THE DOCUMENT UNDER STUDY STATES
THAT: " THE SCALE OF PRICES TO PAY FOR DOUBLE PLASMAPHERESIS
WILL BE FIXED BY THE DEPARTMENT OF PUBLIC HEALTH IN ACCORD
WITH THE BENEFICIARY."

IN PAYING AT THE BEGINNING OF HIS OPERATIONS IN HAITI THE
MINIMUM AMOUNT ESTABLISHED IN THE CONTRACT (\$3.00), THE HOLDER
OF THE CONCESSION DOES NOT ESCAPE THE IMPORTANT BLAME OF HAVING
DETERMINED THE SAID SUM IN A UNILATERAL MANNER WITHOUT ANY
WRITTEN AUTHORIZATION OF THE DEPARTMENT OF PUBLIC HEALTH AND
POPULATION. IT IS RATHER THIS DEPARTMENT WHICH SHOULD HAVE
FIXED PRICE TO PAY.

STRICT INTERPRETATION OF THE CONTRACT AUTHORIZES EVEN
UNCLASSIFIED

PAGE 03 PORT A 01006 01 OF 02 221825 Z

THE STATEMENT THAT THE HOLDER OF THE CONCESSION SHOULD NOT
HAVE BEGUN HIS OPERATIONS BEFORE HAVING OBTAINED A WRITTEN
DECISION OF THE COMPETENT DEPARTMENT FIXING THE PRICE SCALE.

AT THIS LEVEL AGAIN THERE WAS A SUBSTANTIAL AND IMPORTANT
VIOLATION OF THE CONTRACT.

AB) ON THE TECHNICAL LEVEL THE RIGHT OF OVERSIGHT OR
SUPERVISION OF THE DEPARTMENT OF PUBLIC HEALTH AND POPULATION
IS NOT SUBJECT TO ANY COUNTER VERIFICATION; NOWHERE IS THERE
PROVIDED AN ARBITRATION OR THE POSSIBILITY OF APPEAL ON THE
OCCASION OF A DETERMINATION REACHED BY THE DEPARTMENT OF
PUBLIC HEALTH AND POPULATION ON THE FUNCTIONING OF A PLASMA-
PHERESIS CENTER. THE THIRD PARAGRAPH OF ARTICLE 12 ALREADY
CITED, IS WORTH RECALLING: " FAILURE TO MEET THE REQUIREMENTS

OF THE TERMS OF THE PRESENT CONTRACT, CONCERNING OBSERVANCE OF STANDARDS LAID DOWN BY THE DEPARTMENT OF PUBLIC HEALTH WILL RESULT IN BREAKING OF THE CONTRACT."

IT SHOULD BE EMPHASIZED THAT THE CONTRACT DID NOT PROVIDE ANY FORMULA SUCH AS, FOR EXAMPLE, A WARNING TO BE GIVEN TO HEMO CARIBBEAN TO CORRECT MATTERS.

IN THE ABSENCE OF SPECIAL STANDARDS LAID DOWN TO THIS EFFECT BY THE DEPARTMENT OF PUBLIC HEALTH-- I QUOTE THE CONTRACT, ARTICLE 1, IN DETAIL - " THE MINIMUM STANDARDS WILL BE THOSE ESTABLISHED BY THE NATIONAL INSTITUTE OF HEALTH (NIH) UNTIL FURTHER NOTICE.

THE DECISION OF GOH TO TERMINATE THE COMPANY' S ACTIVITIES IS BASED ON A REPORT DRAWN UP BY PHYSICIANS AND TECHNICIANS OF THE SAID MINISTERIAL DEPARTMENT. ON PAGE 3 (4 TH PARAGRAPH) OF THIS REPORT WHICH HAS BEEN ENDORSED BY THE DEPARTMENT OF PUBLIC HEALTH AND POPULATION ONE MAY READ: " THE INTERNATIONAL STANDARDS OF HYGIENE AND OF PROPHYLAXIS ESTABLISHED BY THE NIH HAVE HARDLY BEEN RESPECTED."

THIS DENUNCIATION OF VIOLATION OF THE CONTRACT WOULD SUFFICE AMPLY DENUNCIATION OF THE CONTRACT BY THE HAITIAN STATE.

B) FURTHERMORE, THE TEXT SIGNED SEPTEMBER 4, 1970 PROVIDED THAT THE HOLDER OF THE CONCESSION SHOULD COLLABORATE WITH THE DEPARTMENT OF PUBLIC HEALTH AND POPULATION FOR THE TRAINING OF NURSES AND SPECIALIZED TECHNICIANS (ARTICLE 1) . THE HOLDER OF THE CONCESSION NEVER MET THIS OBLIGATION LAID UPON HIM AND

UNCLASSIFIED

PAGE 01 PORT A 01006 02 OF 02 221842 Z

41

ACTION ARA-17

INFO OCT-01 ADP-00 SS-15 NSC-10 AID-20 CIAE-00 DODE-00

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P 221730 Z JUN 73

FM AMEMBASSY PORT AU PRINCE

TO SECSTATE WASHDC PRIORITY 6002

UNCLAS SECTION 2 OF 2 PORT AU PRINCE 1006

B. THE MAJOR AND DETERMINING CAUSE OF FORECLOSURE:
BESIDES THE CAUSES FOR FORECLOSURE EXPRESSLY SET FORTH IN THE CONTRACT THERE IS A PROVISION OF THE TEXT WHICH ASSUMES EVEN GREATER IMPORTANCE THAN THAT ATTACHED TO THE STIPULATIONS CONSIDERED THUS FAR. THIS PROVISION DETERMINES EXACTLY THE COMMERCIAL PURPOSE OF THE CONCESSION HOLDER' S

OPERATIONS. IT ANSWERS THE FOLLOWING QUESTION WHICH IS OF CAPITAL IMPORTANCE: FOR WHAT MARKET WILL THE PLASMA BE PRODUCED?

THE SECOND SENTENCE OF ARTICLE 10 OF THE CONTRACT OF SEPTEMBER 4, 1970 READS AS FOLLOWS: IT IS UNDERSTOOD THAT THE PLASMA OR ANY OTHER PRODUCT MANUFACTURED BY THE BENEFICIARY OR ANY SOCIETY OR PHYSICAL PERSON BELONGING TO THE HEMO CARIBBEAN COMPLEX WILL BE SOLD TO THE HAITIAN STATE FOR THE USE OF ITS HOSPITALS."

NO PROVISION OF THE CONTRACT PROVIDES FOR EXPORTATION OF THE PLASMA. THE STIPULATION OF ARTICLE 10 SHOULD BE UNDERSTOOD AS BEING EXCLUSIVE AND EXHAUSTIVE; WE EMPHASIZE THE STRENGTH OF THE EXPRESSION " WILL BE SOLD" AS OPPOSED TO POSSIBLE FORMULAS SUCH AS " PART OF THE PRODUCTION", OR " ALL OR PART OF THE PRODUCTION WILL BE SOLD", OR STILL FURTHER, " THE PLASMA OR ANY OTHER PRODUCT... MAY BE SOLD."

THE CONTRACT IS DEFINITELY CATEGORICAL AND AFFIRMATIVE AND FROM A PURELY GRAMMATICAL POINT OF VIEW AS FROM A LEGAL UNCLASSIFIED

PAGE 02 PORT A 01006 02 OF 02 221842 Z

POINT OF VIEW, THE PLURAL USED (" THE PLASMA OR ANY OTHER PRODUCT... WILL BE SOLD") GIVES FURTHER STRENGTH TO THE UNDERTAKING OF THE CONCESSION HOLDER TO SELL THE TOTALITY OF HIS PRODUCTION TO THE HAITIAN STATE.

NOW, THE CONCESSION HOLDER CANNOT PRODUCE ANY DOCUMENT PROVING THE SALE TO THE HAITIAN STATE (BILLS, SALES SLIPS, RECEIPTS, ORDERS, ETC.) OF ALL HIS PRODUCTION. IT IS TO THE CONTRARY ESTABLISHED THAT THE PLASMA WAS EXPORTED.

MR. JOSEPH B. GORINSTEIN'S LAWYERS COULD TRY TO SAY THAT THE HAITIAN AUTHORITIES HAD, BY PURELY ADMINISTRATIVE ACTS, AUTHORIZED HEMO CARIBBEAN'S EXPORTATIONS OF PLASMA.

TO THAT, AND ON THE BASIS OF THE THEORY OF THE ADMINISTRATIVE ACT, WE WILL REPLY THAT THE DECISION OF AN EXECUTIVE AGENT (AND WHEN HE ACTS OR DECIDES SINGLY, THE SECRETARY OF STATE IS ONLY AN ADMINISTRATIVE AGENT) CANNOT DEROGATE AN AGREEMENT RATIFIED BY THE ENSEMBLE OF THE EXECUTIVE POWER (CHIEF OF STATE AND ALL THE SECRETARIES OF STATE) BY AUTHORITY OF A DOCUMENT OF PARA- LEGISLATIVE NATURE (THE DECREE APPROVING THE CONTRACT WHICH HAS THE FORCE OF LAW AND WHICH COULD NOT HAVE BEEN PROMULGATED OTHERWISE THAN UNDER THE EXERCISE OF THE " FULL POWERS" CONFERRED ON THE HEAD OF THE EXECUTIVE POWER BY THE LEGISLATIVE CHAMBER. THE ADMINISTRATIVE ACT EVOKED HERE COULD EVEN LESS ABROGATE A PROVISION OF THE CONTRACT.

FINALLY, SO AS NOT TO LEAVE THE DOOR OPEN TO INTERMINABLE DISCUSSIONS ON THE THEORY OF THE VALUE OF THE ADMINISTRATIVE ACT, WE WILL ONLY STATE THAT THE HAITIAN STATE SIMPLY TOOK NOTE OF THE NON- EXECUTION OF THE CONTRACT OF SEPTEMBER 4, 1970 IN REVOKING THE DECREE AUTHORIZING THE OPERATION OF HEMO CARIBBEAN.

AT THE MOST WE SHOULD ADMIT THAT BY PURE TOLERANCE CERTAIN OFFICIALS HAD PERMITTED THE CONCESSION HOLDER TO

EXPORT PLASMA DURING A CERTAIN PERIOD. IT IS EVIDENT THAT THE TOLERANCE OF ONE OR SEVERAL ADMINISTRATIVE AGENTS CANNOT EMPTY THE CONTRACT OR ONE OF ITS ESSENTIAL CLAUSES OF ITS CONSTRAINING EFFECT.

THE ABROGATION CLAUSES FIGURING EXPRESSLY IN THE TEXT OF THE CONTRACT CANNOT BE CONSIDERED AS EXCLUSIVE OR ABSOLUTELY LIMITING.

IN ANY RECIPROCAL CONTRACT THE OBLIGATIONS TO ACT OR NOT ACT ARE IMPOSED ON ALL THE PARTIES. SO THE NON- EXECUTION
UNCLASSIFIED

PAGE 03 PORT A 01006 02 OF 02 221842 Z

OF ONE OF THE ESSENTIAL PROVISIONS OF SUCH A CONTRACT CONSTITUTES A VIOLATION AND UNQUESTIONABLY A CAUSE FOR ANNULMENT OF THAT INSTRUMENT.

FOR THE REASONS AND CAUSES SET FORTH ABOVE AND FOR ALL OTHER REASONS OF LAW THAT A JUDICIAL ACTION COULD CLARIFY, THE HAITIAN STATE HAD THE CAPACITY AND THE RIGHT TO PUT AN END TO THE ACTIVITIES OF HEMO CARIBBEAN WITHOUT EITHER PRIOR NOTICE OR WARNING.

SIGNED SERGE FOURCAND
PORT- AU- PRINCE, JUNE 15, 1973
CORCORAN

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<< END OF DOCUMENT >>

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